IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATIONAL ORGANIZATION ON DISABILITY, et al.	:	CIVIL ACTION
v.	:	
MARGARET M. TARTAGLIONE, et al.	:	NO. 01-1923

MEMORANDUM

Padova, J. **October , 2001**

Plaintiffs, organizations who advocate for the disabled, membership organizations of persons with disabilities, and disabled individuals, filed this action on April 19, 2001, alleging that the Commissioners of the City of Philadelphia in charge of elections and the purchase of voting machines have violated their civil rights under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 (1994), and Section 504 of the Rehabilitation Act of 1973 (the "Rehabilitation Act"), 29 U.S.C. § 794(a) (1994), by denying them equal and integrated access to polling places and accessible voting machines. Before the Court is Defendants' Motion to Dismiss the Complaint. For the reasons which follow, the Motion will be granted in part and denied in part.

I. BACKGROUND

There are four organizational Plaintiffs. National Organization on Disability is an advocacy organization which seeks to increase voting by persons with disabilities. Liberty Resources, Inc. is a social service organization which seeks to

eliminate discrimination against persons with disabilities and to eliminate barriers that prevent persons with disabilities from participating fully in their communities. Pennsylvania Council of the Blind is a membership organization of blind and visually impaired persons living in Pennsylvania. The National Federation of the Blind of Pennsylvania is a membership organization that advocates for the civil rights of persons who are blind. There are nine individual Plaintiffs who have either visual or mobility impairments who seek to represent a class of similarly situated disabled voters. The visually impaired Plaintiffs, Denice Brown, Patrick Comorato, Suzanne Waters, Suzanne Erb, and Fran Fulton, are all legally blind. The mobility impaired Plaintiffs, Jesse Jane Lewis, Theresa Yates, Julia Campolongo, and Karin DiNardi, use wheelchairs to ambulate.

The Complaint alleges the following facts. The voting machines used by the City of Philadelphia are not accessible to visually impaired voters. Consequently, visually impaired voters cannot vote independently and secretly at their neighborhood polling places, as non-disabled voters do, but must be helped by a third person or vote by absentee ballot. Other jurisdictions utilize electronic voting machines which enable visually impaired voters to vote independently and secretly through the use of audio output technology.

In addition, the vast majority of Philadelphia's neighborhood polling places are inaccessible to persons with mobility impairments, and the City does not require that new polling places be accessible to persons who use wheelchairs. Only three percent of the City's 1,681 polling places are accessible to voters who use wheelchairs. Consequently, voters with mobility impairments cannot vote where their neighbors vote and are forced to vote by absentee ballot or by alternative ballot.[1]

Defendants Margaret Tartaglione and Joseph Duda are Philadelphia City Commissioners responsible for supervising all elections in Philadelphia, choosing polling places and developing requests to purchase new voting machines. Defendant Louis Applebaum is the Commissioner of the Philadelphia Procurement Department and is responsible for purchasing new voting machines for the City. Defendants issued a Request for Proposal for the purchase of new electronic voting machines in December 1999, but did not request that the machines utilize audio output technology which would allow visually impaired voters to vote independently and secretly. Louis Applebaum subsequently entered into a contract, on behalf of the City of Philadelphia, for new electronic voting machines on April 4, 2001, without requiring that those new

[1]Alternative ballots are similar to absentee ballots but may be returned to the county board of elections on election day while absentee ballots must be returned by 5:00 p.m. on the Friday before the election.

machines be accessible and independently usable by visually impaired voters. In addition, Defendants have failed to ensure that polling places selected for use in elections held in the City of Philadelphia are accessible to mobility impaired voters and have failed to explore the possibility of reasonable modifications to ensure that polling places could be accessible.

The Complaint alleges six counts: Count I alleges a claim for violation of the ADA and 28 C.F.R. § 35.130 resulting from Defendants' discrimination against Plaintiffs on the basis of their disabilities and denial of their right to vote in the same manner as non-disabled persons; Count II alleges a claim for violation of the ADA and 28 C.F.R. § 35.151 based upon Defendants' purchase of new electronic voting machines which are not accessible and independently usable by persons with disabilities; Count III alleges a claim for violation of the ADA and 28 C.F.R. §§ 35.130(B)(4) and (5), 35.150(a), (b)(1) and (d), and 35.130(b)(4) based upon Defendants' failure to select accessible polling places.[2] The Complaint also alleges, in Count VI, that Defendants have violated Section 504 of the Rehabilitation Act and 45 C.F.R. § 84.22(a) and (b), by denying to Plaintiffs, because of their disabilities, the right to vote in the same manner as non-disabled persons.

II. LEGAL STANDARD

[2]Plaintiffs have agreed to withdraw Counts IV and V.

Defendants move to dismiss the Complaint for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordon v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the Plaintiffs. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when Plaintiffs cannot prove any set of facts, consistent with the complaint, which would entitle them to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). Defendants also move to dismiss for failure to join an indispensable party pursuant to Federal Rule of Civil Procedure 12(b)(7).

III. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

A. Plaintiffs' Claims for Discrimination in Voting

Defendants argue that Plaintiffs cannot state a claim upon which relief may be granted for violation of the ADA and the Rehabilitation Act because none of the individual Plaintiffs have been prevented from voting by Defendants' actions. Title II of the ADA states that: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of

a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. In order to state a claim for violation of Title II of the ADA, Plaintiffs must prove the following: (1) they are disabled; (2) they have been "excluded from participation in or denied the benefits of services, programs or activities provided by a pubic entity, or [were] otherwise discriminated against by a public entity"; and (3) that such discrimination was based on their disabilities. Adelman v. Dunmire, Civ.A.No.95-4039, 1997 WL 164240, at *1 (E.D. Pa. Mar. 28, 1997) (citations omitted). Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a). In order to state a claim for violation of Section 504 of the Rehabilitation Act, a plaintiff must establish that: "1) she is a 'handicapped individual,' 2) she is 'otherwise qualified' for participation in the program, 3) the program receives 'federal financial assistance,' and 4) she was 'denied the benefits of' or 'subject to discrimination' under the program." Nathanson v. Medical College of Pennsylvania, 926 F.2d 1368, 1380 (3d Cir. 1991).

Defendants argue that the Complaint should be dismissed in its entirety because they have not deprived Plaintiffs of the

benefit of any services, programs or activities or discriminated against them as the City of Philadelphia has provided alternative means to enable Plaintiffs to vote and Plaintiffs have voted. The City of Philadelphia provides absentee and alternative ballots for voters who cannot vote at their assigned polling places and permits assisted voting for visually impaired voters in order to comply with the Voting Accessibility of the Elderly and Handicapped Act of 1984 (the "VAEH"), 42 U.S.C. § 1973ee-1, et seq. (1994). The VAEH requires that the States "assure that all polling places for Federal elections are accessible to handicapped and elderly voters . . ." unless "the chief election officer of the State . . . (B) assures that any handicapped or elderly voter assigned to an inaccessible polling place, upon advance request of such voter . . . (ii) will be provided with an alternative means for casting a ballot on the day of the election." 42 U.S.C. § 1973ee-1.

Defendants rely on NAACP v. Philadelphia Board of Elections, Civ.A.No. 97-7085, 1998 WL 321253 (E.D. Pa. June 16, 1998), in which the court determined that Defendants' use of these alternative ballot procedures is a reasonable modification to comply with the ADA and fulfills their obligations under the ADA. Id. at *3. The issue in NAACP v. Philadelphia Bd. of Elections was whether the City of Philadelphia could use its alternative ballot procedures, promulgated to comply with the VAEH, in state and local elections. The NAACP argued that the alternative ballot procedures

should not be used in non-federal elections because they create the opportunity for fraud. Id. at *5. Defendants argued that they were using the procedures to comply with their obligations under the ADA. Id. at *3. The court concluded that: "Defendants are not required to provide the specific procedure authorized under the VAEH, but the decision to do so is a reasonable modification to comply with the ADA and 28 C.F.R. § 35.130(b)(7)." Id. at *4. However, the specific issue at the center of this case, whether the ADA requires Defendants to take additional steps to avoid discrimination and provide equal access to the voting process, was not before the court. Consequently, NAACP v. Philadelphia Bd. of Elections is not controlling here.

Furthermore, Defendants' argument that Plaintiffs cannot state claims for relief pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act because Plaintiffs have not been prevented from voting mischaracterizes the Complaint. Plaintiffs do not allege that Defendants violated the ADA and the Rehabilitation Act by preventing them from voting, or by forcing them to use alternative ballots; rather, Plaintiffs claim to have been discriminated against in the process of voting because they are not afforded the same opportunity to participate in the voting process as non-disabled voters.

The Complaint alleges that assisted voting and voting by alternative ballot is substantially different from, more burdensome

than, and more intrusive than the voting process utilized by non-disabled voters for the following reasons: (1) visually impaired voters must find a person willing to assist them in voting or rely on the assistance of a poll worker who is a stranger (Compl. ¶ 28); (2) visually impaired voters cannot vote in privacy and secrecy because the ballot must be read to them and their votes must be disclosed to others (Compl. ¶ 28); and (3) mobility impaired voters cannot vote with their neighbors in a convenient location because only three percent of polling places in the City of Philadelphia are accessible to persons using wheelchairs (Compl. ¶ 46). The Complaint further alleges that, even though Defendants have had the opportunity to alleviate these barriers by purchasing electronic voting machines which could be used privately and secretly by persons with visual impairments and by choosing polling places which would be accessible to persons with mobility impairments, Defendants have failed to do so. (Compl. ¶¶ 36-37 and 44-45.) The Complaint also asserts that Defendants have violated the ADA and the Rehabilitation Act by failing to purchase electronic voting machines usable by persons with visual impairments and by failing to select accessible polling places or modify inaccessible polling places to make them accessible. (Compl. ¶¶ 56, 58-59, and 63-64.)

The Complaint alleges that the individual Plaintiffs are qualified voters with disabilities, that Plaintiffs have been discriminated against by Defendants because they cannot participate

in the program or benefit of voting in the same manner as other voters but, instead, must participate in a more burdensome process, and that the discrimination is due to Plaintiffs' disabilities. Accordingly, the Court concludes that the Complaint states a claim for discrimination in the process of voting in violation of Title II of the ADA and Section 504 of the Rehabilitation Act upon which relief could be granted.

B. Standing

Defendants also argue that the Complaint should be dismissed because the Plaintiffs do not have standing to assert their claims. Defendants assert that the individual Plaintiffs, who have voted in past elections, have not suffered an "injury in fact" and, consequently, lack standing to pursue their claims pursuant to the ADA. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Defendants further argue that since the individual Plaintiffs lack standing, the organizational defendants also lack standing.

Standing has three elements: injury, a causal connection between the injury and the conduct complained of, and the likelihood that the injury would be redressed by a favorable decision. Lujan, 504 U.S. at 560-61. The Complaint alleges that the individual Plaintiffs have been injured because they cannot participate in the program or benefit of voting in the same manner as other voters but, instead, must participate in a more burdensome

process. The Complaint further alleges that the injury was caused by Defendants' conduct in failing to purchase electronic voting machines that would enable visually impaired voters to vote in the same manner as non-disabled voters and in failing to choose polling places that are accessible to mobility impaired voters. The Complaint also alleges that Plaintiffs' injuries can be redressed by injunctive relief if the Court renders a decision in their favor. Accordingly, the individual Plaintiffs have standing to prosecute this suit.

Since the individual Plaintiffs have standing, those Plaintiffs who are membership organizations of persons with disabilities have standing as well. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 334 (1977) ("[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right. . . .") In addition, those Plaintiffs who are advocacy organizations have standing because they have alleged the expenditure of significant resources in fighting Defendants' conduct. Havens Realty Co. v. Coleman, 455 U.S. 363, 379 (1982).

C. Plaintiffs' Claims of Regulatory Violations

Defendants also argue that Counts II and III of the Complaint, alleging violations of the ADA through failure to comply with its implementing regulations, should be dismissed for failure to state claims upon which relief may be granted. Count II of the

Complaint alleges that Defendants' purchase of new electronic voting machines that are not accessible and independently usable by visually disabled voters violates the ADA and 28 C.F.R. § 35.151(a). Count III of the Complaint alleges that Defendants select polling places that are inaccessible to mobility impaired voters in violation of the ADA and 28 C.F.R. § 35.130.

1. 28 C.F.R. § 35.151

Section 35.151(a) of Title 28 of the Code of Federal Regulations requires that facilities constructed for the use of public entities "shall be designed and constructed" so that they are "readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992." 28 C.F.R. § 35.151. The term "facilities" is defined to include equipment and personal property. 28 C.F.R. § 35.104 ("Facility means all or any portion of . . . equipment, rolling stock or other conveyances. . . or other real or personal property. . . ."). Defendants argue that Count II of the Complaint should be dismissed because voting machines are not equipment subject to 28 C.F.R. § 35.151.

Defendants rely upon the Department of Justice's commentary to this regulation which states that mobile facilities, such as bookmobiles or mobile health screening units, are not subject to this regulation, but are subject to the requirements for accessibility in existing buildings provided by 28 C.F.R. § 35.150.

28 C.F.R., pt. 35, App. A. Section 35.150 provides that public entities are not necessarily required to "make each of [their] existing facilities accessible to and usable by individuals with disabilities" and that public entities are "not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section." 28 C.F.R. § 35.150 (a)(1) and (b)(1). Defendants argue that voting machines, which are transportable, are subject to 28 C.F.R. § 35.150 and, therefore, the ADA does not require the City to ensure that its new voting machines are accessible to the visually impaired.

Defendants' reliance on the commentary to Part 35 is misplaced. The definition of facility, as used in section 35.151, plainly includes equipment and personal property and does not specify any exclusion for transportable equipment or personal property such as voting machines. 28 C.F.R. § 35.104. Moreover, the commentary upon which Defendants base their argument concerns the applicability of these regulations to "activities operated in mobile facilities, such as bookmobiles or mobile health screening units" and states that such activities would be covered by section 35.150. 28 C.F.R., pt. 35, App. A, § 35.104. The commentary does not modify the definition of "facility" to exclude transportable equipment and personal property or relegate transportable equipment to the requirements of section 35.150 rather than section 35.151.

Defendants also argue that Plaintiffs cannot state a

claim pursuant to 28 C.F.R. § 35.151 because there is no private right of action to enforce that regulation. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Alexander v. Sandoval, 121 S. Ct. 1511, 1519 (2001) (citations omitted). This inquiry into Congressional intent begins with the text and structure of the ADA. Id. at 1520.

The text of the ADA evidences an intent to create a private remedy to enforce violations of Title II of that statute. See Parker v. Universidad de Puerto Rico, 225 F.3d 1, 4 (1st Cir. 2000). The ADA specifically grants to persons alleging discrimination in violation of Title II of the ADA, the "remedies, procedures, and rights set forth in section 794a of the Title 29." 42 U.S.C. § 12133 (1994). Section 794a makes available to any person "aggrieved by any act or failure to act by any recipient of Federal assistance" the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." 29 U.S.C. § 794a (1994). Although Title VI does not, itself, authorize a private cause of action, the Supreme Court has recognized that "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages." Alexander v. Sandoval, 121 S. Ct. at 1516.

The Supreme Court recognized in Sandoval that Congressional intent to create a private remedy for enforcement of a statute extends to the regulations promulgated to enforce that statute, if the reach of those regulations does not extend beyond that of the statute itself:

> Such regulations, if valid and reasonable, authoritatively construe the statute itself . . . and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

Alexander v. Sandoval, 121 S. Ct. at 1518-19. The regulations promulgated to implement Title II of the ADA, including those governing access to new public facilities, were mandated by Congress, which specifically directed the Department of Justice to adopt regulations consistent with the "coordination regulations" which were issued with respect to the Rehabilitation Act. 42 U.S.C. § 12134(b) (1994) ("With respect to 'program accessibility, existing facilities', and 'communications', such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations. . . ."). Section 35.151 of Title 28 of the Code of Federal Regulations is virtually identical to the coordination regulations promulgated with respect to the Rehabilitation Act and, consequently, is within the statutory boundaries of Title II of the ADA. Helen L. v. DiDario, 46 F.3d

325, 332 (3d Cir. 1995) ("because Congress mandated that the ADA regulations be patterned after the section 504 coordination regulations, the former regulations have the force of law.") (citations omitted). Moreover, the House Report on the ADA reflects that Congress specifically intended that aggrieved individuals be able to bring private actions for violations of these regulations:

> Section 205 of the legislation specifies that the remedies, procedure and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be available with respect to any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of an provisions of this Act, or regulations promulgated under section 204, concerning public services.

H.R. Rep. No. 101-485(II), at 99, reprinted in 1990 U.S.C.A.A.N. 267, 381. Accordingly, Plaintiffs may maintain a cause of action for violation of the ADA and 28 C.F.R. § 35.151.

2. 28 C.F.R. § 35.130

Section 35.130 of Title 28 of the Code of Federal Regulations provides that a public entity may not select a location for a public facility that has "the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination. . . ." 28 C.F.R. § 35.130(b)(4). Defendants argue that Plaintiffs cannot state a claim for violation of this regulation because the mobility impaired Plaintiffs have not been denied the benefit of voting

since they can take advantage of alternative ballots. Plaintiffs do not, however, claim that they have been discriminated against because they cannot vote, but because they cannot vote in the same manner as non-disabled voters. The Complaint alleges that Defendants regularly reassign polling places to new locations but do not require that those new sites be accessible to voters with mobility impairments. The Defendants' selection of inaccessible polling places, therefore, can have the effect of depriving mobility impaired voters of the benefit of voting in their neighborhood polling places in the same manner as non-disabled voters, in violation of 28 C.F.R. § 35.130(b)(4). The Complaint, therefore, does state a legally cognizable claim for violation of the ADA and 28 C.F.R. § 35.130.

D. The Rehabilitation Act

In addition to their argument, discussed above, that Plaintiffs cannot state a claim in Count VI pursuant to the Rehabilitation Act because Plaintiffs have not been denied the right to vote, Defendants also argue that Count VI must be dismissed because Plaintiffs have failed to plead the receipt of federal funds in connection with the purchase of voting machines or the selection of polling places. Defendants rely on Wagner v. Fair Acres Geriatric Center, 49 F.3d 1002 (3d Cir. 1995) in which the court states that in order to state a claim under the Rehabilitation Act a plaintiff must prove that "the program or

activity in question receives federal financial assistance." Id. at 1009.

The Complaint alleges that Board of Elections and the City Departments involved in the purchase of the voting machines receive federal funds. (Compl. ¶ 62). That allegation is sufficient, for purposes of Rule 12(b)(6), to state a claim for violation of § 504 of the Rehabilitation Act:

> The Rehabilitation Act requires States that accept federal funds to waive their Eleventh Amendment immunity to suits brought in federal court for violations of Section 504. 42 U.S.C § 2000d-7. Since Section 504 covers only the individual agency or department that accepts or distributes federal funds, this waiver requirement is limited in the same way. By accepting funds offered to an agency, the State waives its immunity only with regard to the individual agency that receives them.

Jim C. v. Atkins School Dist., 235 F.3d 1079, 1081 (8th Cir. 2000)(en banc), cert. denied, 121 S. Ct. 2591 (2001).

IV. FEDERAL RULE OF CIVIL PROCEDURE 12(b)(7)

Defendants argue, pursuant to Federal Rule of Civil Procedure 12(b)(7), that the Complaint should be dismissed for failure to join the Secretary of the Commonwealth of Pennsylvania as a party under Rule 19. Federal Rule of Civil Procedure 19 provides as follows:

> **(a) Persons to be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete

> relief cannot be accorded among those already parties. . . .

Fed. R. Civ. P. 19(a). When determining whether a party should be joined pursuant to Rule 19(a), the Court first examines "whether complete relief can be accorded to the parties to the action in the absence of the unjoined party." Drysdale v. Woerth, Civ.A.No.98-3090, 1998 WL 966020, at *3 (E.D. Pa. Nov. 18, 1998). The purpose of Rule 19(a)(1) is "to avoid partial or hollow relief" because "the interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter." Id. (citing Fed. R. Civ. P. 19 Advisory Committee's Notes). The moving party has the burden of showing why an absent party should be joined pursuant to Rule 19. Raytheon Co. v. Continental Cas. Co., 123 F. Supp. 2d 22, 33 (D. Mass. 2000). "The moving party may present, and the Court may consider, evidence outside of the pleadings" with respect to this issue. Id.

The Pennsylvania Election Code prohibits the use of voting machines which have not been pre-approved by the Secretary of the Commonwealth. 25 Penn. Stat. Ann. § 3006 ("No kind of voting machines not so approved shall be used at any election."). Defendants aver, and Plaintiffs concede, that the Secretary of the Commonwealth has not approved any electronic voting machines with the audio output technology required by the visually impaired Plaintiffs. Consequently, if Plaintiffs were to succeed in this

proceeding, the Court could not order Defendants to use the accessible voting machines sought by the visually impaired Plaintiffs. Plaintiffs admit that, if they are successful in this action, approval of these voting machines would have to be sought from the Secretary of the Commonwealth and, if the Secretary does not approve electronic voting machines with audio output technology, a new proceeding would have to be initiated against the Secretary.

It is clear, under these circumstances, that the Court could not afford complete relief to the visually impaired Plaintiffs in this matter in the absence of the Secretary of the Commonwealth. Accordingly, Defendants' Motion to Dismiss the claims of the visually impaired Plaintiffs pursuant to Federal Rule of Civil Procedure 12(b)(7) is granted.

V. CONCLUSION

For the reasons set forth above, the Motion to Dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) is denied with respect to Counts I, II, III and VI of the Complaint. The Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) will be denied as moot with respect to Counts IV and V of the Complaint because Plaintiffs have agreed to withdraw those Counts. The Motion to Dismiss the claims of the visually impaired Plaintiffs for failure to join an indispensable party pursuant to

Federal Rule of Civil Procedure 12(b)(7) is granted, without prejudice, and with leave to amend the Complaint to state a claim against the Secretary of the Commonwealth. An appropriate Order follows.

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O R D E R

AND NOW, this day of October, 2001, in consideration of Defendants' Motion to Dismiss (Docket No. 11), Plaintiffs' response thereto, Defendants' reply memorandum of law, and the argument of the Parties held on September 27, 2001, **IT IS HEREBY ORDERED** that the Motion to Dismiss is **GRANTED** in part **and DENIED** in part as follows.

1. Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(7) is **GRANTED** with respect to the claims for discrimination against visually impaired voters pursuant to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. Those claims are hereby **DISMISSED** without prejudice and with leave to amend the Complaint to add a claim against the Secretary of the Commonwealth within twenty (20) days of this Order;

2. Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is **DENIED** with respect to Counts I, II, III and VI of the Complaint;

3. Counts IV and V of the Complaint are marked **WITHDRAWN** AND Defendants' Motion to Dismiss those Counts pursuant to Federal Rule of Civil Procedure 12(b)(6) is **DENIED** as moot.

BY THE COURT:

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John R. Padova, J.